

regulation ... [But] only when and if it is acting within the scope of its congressionally delegated authority."

106 S. Ct. at 1898 and 1901. (Citations omitted; numbered brackets added for convenience; emphasis added.)

Even though the PSC did not cite *Louisiana*, it is evident from the language in its decision that the Commission concluded that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service...." (Conclusion of Law No. 3) as if the Commission had deliberated under the preemption type 7. The Commission did not conclude that it is federally preempted under any of preemption types one through six. Given the system of dual federal and state regulation of telecommunications, there is no purpose in extended discussion about the inapplicability of preemption types 2 through 6. And given the Commission's reliance on type 7 preemption by FCC action, there is no purpose in extended discussion about type 1 preemption based solely on words of the acts of Congress.

The Commission's preemption Conclusion of Law (No. 3) and the related ultimate Finding of Fact (No. 38) that "... WRS [wireless residential service] has mobile capabilities and is therefore a mobile service" are erroneously based on the FCC's statements in two reports and orders affecting permissible uses of licensed wireless telephone spectrum, cited in Findings of Fact Nos. 35 and 36.

If the Commission had adopted the words of the *Louisiana* decision to articulate its type 7 decision, it might have said: "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service not as a result of action taken by Congress itself but by the FCC acting within the scope of its congressionally delegated authority." But, regardless of the words used to declare the Commission's decision that North Dakota is federally preempted by type 7 action, that decision is simply and plainly erroneous for the single and simple reason that the FCC **has not acted** to preempt state regulation!

The so-called "CMRS Flexibility Order" (cited by the Commission in Finding No. 36) is the closest thing to "action" by the FCC addressing the type 7 preemption issue, whether state jurisdiction has been preempted by the FCC acting within the scope of its congressionally delegated authority under the Communications Act. To paraphrase the words of the *Louisiana* decision, preemption

has not occurred, because of the absence of a clear expression by Congress. Neither has preemption occurred as a result of the FCC acting within the scope of its congressionally delegated authority - **because the FCC has not acted at all on the specific issue of wireless residential service.** In the Flexibility Order, the FCC specifically abstained from acting to preempt state regulation of wireless residential service. First Report and Order and Further Notice of Proposed Rulemaking, June 27, 1996, WT Docket No. 96-6 FCC 96-283. Type 7 preemption has not occurred because the federal agency has not taken any preemptive action on this issue.

There is no denying the 1996 FCC's Flexibility Order signaled its leaning towards action to claim preemption authority, excluding states' jurisdiction (consistent with the federal agency's long-standing record of assaults on states' jurisdiction over intrastate telecommunications by any technology). But the FCC's proposal of rules is not the legal equivalent of the adoption of rules to preempt states' jurisdiction. If there is no type 1 preemption because there is no clear congressional expression, then there can be no type 7 preemption rule where the related federal agency has not clearly exercised delegated power to preempt state jurisdiction.

If the FCC's 1996 Flexibility Order and Notice of Proposed Rulemaking is to have any effect on the Commission's disposition of this case, the Commission's decision should not be "we regard the FCC as having acted to preempt state authority." On the contrary, in fulfillment of its responsibilities to North Dakota, the Commission's position should be: "After three years of not acting on its proposed rules, we acknowledge the FCC has not acted to preempt state jurisdiction to regulate wireless residential service Type 7 preemption has not occurred."

Even if the "CMRS Flexibility Order" had been enacted rather than merely proposed - indeed, even if the FCC had intervened or participated in this case on an amicus basis to make such a claim - even in those circumstance the PSC should have performed its duty to enforce North Dakota law and reject any preemption claim as an overreaching of the FCC's authority under applicable federal statutes and court precedents.

As stated in the *Louisiana* case, type 7 preemption occurs only when and if the federal agency is acting within the scope of its congressionally delegated authority. "An agency may not confer power on itself." *Louisiana*, 106 S. Ct. 1901. As reiterated in a

Court's 1999 decision affecting the 1996 Act, the important distinction is whether the FCC has explicit rulemaking authority given to it by Congress. **A.T.&T. v. Iowa Utilities Board**, 119 U.S. 721, n.7 (1999). Where agency action does not conform to the plain meaning of a statute, or where an agency's construction of a statute is arbitrary, capricious or manifestly contrary to the statute, the agency interpretation will not be sustained. **Chevron, U.S.A., Inc. v. Natural Resources Defense**, 467 U.S. 837, 104 S. Ct. 2778 (1984); **Texas Office of Public Utility Counsel et al. v. Federal Communications Commission** (5th Cir. July 30, 1999, in Case No. 97-60421).

Section 49-03.1-01, NDCC, states that no public utility shall begin operation of a public utility system without first obtaining from the PSC a certificate of public convenience and necessity (PCN). Western Wireless is within the definition of a public utility as defined in §49-03.1-02(2), NDCC.

Section 49-21-08, NDCC, states that when a telecommunications company furnishes adequate local service and supplies the reasonable wants of a community in which it is operating, the PSC shall not grant any other company the right to compete in the provision of local exchange service until after a public hearing and a finding that the public convenience and necessity may require such competing plant.

The North Dakota Century Code provides no discretion to the PSC which would allow it to excuse Western Wireless from the requirement to obtain a certificate prior to operating telecommunications facilities. Thus, there is no basis for Western Wireless to claim exemption from the PCN requirement on the ground that the burden of filing an application deters it from entering the market to compete for business. Even if, *arguendo*, the PSC had such authority, it would be harmful to competition to exempt some carriers, whether competitive or incumbent, and not others from the requirements. The PSC must enforce the law in a competitively neutral manner.

On October 22, 1997, the PSC granted Western Wireless's subsidiary Eclipse Communications Corporation application for a PCN certificate to provide local exchange service on a facilities, resale, or combination basis throughout the state. (Case No. PU-1693-97-269). On September 25, 1997, the PSC granted a similar application by AT&T of the Midwest. (Case No. PU-453-96-84) On May 31, 1996, the PSC granted the application of Consolidated's

subsidiary, Consolidated Communications Networks, Inc., for PCN certificates to provide local exchange telecommunications services. None of these applicants claimed that the certificate process constituted an undue burden or created a barrier to entry.

The prior provision of cellular mobile service over the same facilities does not excuse the failure to obtain a certificate. The WRS of Western Wireless essentially uses the same infrastructure that Western Wireless has been using to provide analog mobile cellular service, except that specialized customer premises equipment is required to complete the radio circuit. The customer then connects a standard telephone to this equipment. Western Wireless was able to construct and operate the cellular mobile system without a PCN certificate because that service is exempt from state entry and rate regulation (with exceptions not relevant here) by 47 U.S.C. 332(c)(3).

Assuming, for this discussion, that that exemption is not available to the WRS service, the existence of the preexisting exempt service and facilities does not excuse Western Wireless from the requirement to obtain a certificate prior to offering this service. The purpose of the statute is to protect the public interest by ensuring that services vital to health and welfare of the public are provided by entities which are technically and managerially capable and financially sound. Section 49-03.1-04, NDCC. Without such protection, the operational or financial collapse of a carrier could leave a significant segment of the population at risk.

Cellular mobile and fixed residential service are two distinct markets with distinct public interest evaluations. Although it has grown rapidly, cellular mobile has not become a ubiquitous, essential service in the way a telephone in the home is established. North Dakota, in fact, has one of the highest subscriber penetration rates in the country for local telephone service.

Where a carrier constructs and operates a facility for an exempt purpose it is not excused from obtaining a certificate before it begins operating the facility for a non-exempt purpose. Otherwise an entity seeking to avoid the law's requirements could simply construct and operate a non-public facility, then convert it to public use.

In any event, the WRS service requires additional construction beyond the existing cellular mobile infrastructure. In order for a subscriber to communicate to and from his or her residence, the black box must be placed in the residence in order to complete the radio circuit. A subscriber with a mobile telephone cannot use the service.

The core issue in this case is whether Western Wireless is obliged to comply with public convenience and necessity principles and processes under North Dakota's statutory law.

This case is not about Western Wireless' entry into the mobile telecommunications business. Under Section 332(c)(3) of the Communications Act of 1934, as amended in 1996, no state has authority to regulate market entry by any commercial mobile service provider. Western Wireless has federal licenses to provide mobile cellular telecommunications service in North Dakota and it is active in that business.

This case is about Western Wireless' entry into the business of providing telecommunications service to fixed locations in competition with incumbent landline local exchange carriers. This case is like the many filed since February of 1996 where facilities based CLECs have applied for certificates of public convenience and necessity to provide local exchange telecommunications service in North Dakota. Indeed, a wholly owned Western Wireless subsidiary named Eclipse Communications Corporation has applied for and received such a certificate. See also Western Wireless' complaint in this case, paragraph 6 which reads: "Western Wireless WRS offering provides consumers in Regent with a competitive alternative to local exchange service offered by Consolidated Telephone."

This case is about Western Wireless' entry into the local exchange telecommunications business even though Western Wireless has not applied for a certificate of public convenience and necessity.

What is different about this case is that Western Wireless asserts the federal law preempting state regulation of commercial mobile radio service also preempts state regulation of fixed wireless service. According to Western Wireless, it does not need a PCN certificate under applicable state law to provide wireless service to fixed locations. In Western Wireless' words: "...wireless residential service is exempt under 47 USC Section

332(c)(3)(a) from state entry and rate regulation because, as a cellular service offering, it is classified as a commercial mobile service, or CMRS." (Transcript, p. 13; opening statement of Western Wireless' legal counsel.) Western Wireless' claim of exemption is explained in its Answer and Motion to Dismiss Counterclaim, p. 3:

"Second, WRS is exempt from state entry and rate regulation under Section 332(c)(3)(A), because it is CMRS. WRS is not merely a fixed service - it includes a significant mobile component and can best be characterized as a hybrid fixed/mobile service. WRS is provisioned using a hybrid fixed/mobile network architecture, consisting of customer premise equipment ('CPE') that allows for the use of existing telephones and other household devices. The CPE simulates 'dial tone' and can be connected to household telephones, facsimiles, and other devices in the home. The CPE operates using AC power (which can be plugged into an electrical outlet anywhere), has battery back-up power (which allows full mobility), and can be connected to a small 5-inch antenna or a large high-gain antenna. This hybrid fixed-mobile service, which uses the cellular network infrastructure, including switching, trunking, cell site equipment, and antenna towers, is clearly CMRS."

Western Wireless' pleadings' factual description of WRS is fully supported by the record of evidence with the important exception that WRS lacks a "significant mobile component." (TR pp. 85-95; 106-107.) Western Wireless is wrong in declaring that fixed WRS is CMRS. It is wrong because the M in CMRS means mobile; WRS may be transportable **but it is not mobile.**

There is substantial legal authority to dismiss Western Wireless' assertion that fixed wireless service and mobile wireless service are one and the same insofar as a state's regulatory powers are concerned.

First, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines mobile service and mobile station in words that foreclose any credible argument that fixed

residential service is mobile. 47 U.S.C. 153 (27) and (28). That definition is (emphasis added):

"The term 'mobile station' means a radio-communications station capable of being moved **and which ordinarily does move.**"

Western Wireless' description of WRS bears repeating:

"WRS is provisioned using a hybrid fixed/mobile network architecture, consisting of customer premise equipment ('CPE') that allows for the use of existing telephones and other household devices. The CPE simulates 'dial tone' and can be connected to household telephones, facsimiles, and other devices in the home. The CPE operates using AC power (which can be plugged into an electrical outlet anywhere), has battery back-up power (which allows full mobility), and can be connected to a small 5-inch antenna or a large high-gain antenna."

The telecommunications service involved in this case is described and marketed by Western as "wireless residential service," in competition with local exchange service available to the same residential locations. Surely the word "residential" - adopted by Western and accepted by the PSC to describe the service involved in this case - denotes service to fixed, immobile stations. The evidence supports that ordinary meaning of the word "residential."

Wireless residential service is provided with equipment that fits a residential setting - AC power and standard desktop telephone sets plus a Tellular device to transmit and receive radiotelephone transmissions. "Battery power provides mobility that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors . . . even though ... the Tellular unit is heavy and awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use." Findings of Fact Nos. 33 and 34. Even the PSC did not believe that it was designed or intended to be moved. Despite these fixed non-mobile characteristics of wireless residential service, the Commission found ... WRS has mobile capabilities and is therefore a mobile service" and "as a mobile service, WRS is exempt from state entry regulation." Findings of Fact Nos. 38 and 39.

Congress has defined a mobile station as a wireless telecommunications station that is "capable of being moved **and which ordinarily does move.**" 47 U.S.C. § 153(28). This definition is statutory law enacted by Congress and prevails over any definition adopted by any agency, including the FCC. Despite this uncomplicated definition containing two elements, the PSC apparently deems itself constrained by some statements (not formally adopted rules) of the FCC that lead the PSC to declare that "WRS has mobile capabilities and is therefore a mobile service." What happened to the "ordinarily does move" element of the statutory definition? How can it be that the FCC or the North Dakota PSC disregards the ordinary meaning of the words of the controlling statute: "and" and "ordinarily does move"?

Second, the FCC has never issued any rules, regulations, orders, or opinions that equate fixed wireless and mobile wireless services so as to foreclose state regulation of fixed wireless service. Indeed, Western Wireless admits the FCC has not classified fixed wireless service as included in the statutory definition of mobile service. The FCC has not made any rules that would classify fixed wireless service as CMRS (mobile) service. (See First Report and Order and Further Notice of Proposed Rule Making WT Docket No. 96-6, August 1, 1996, referred to by Commissioners at TR, pp. 104-106 and 114-115. See Western Wireless Answer and Motion to Dismiss Counterclaim, p. 4.)

Third, the entire import of the FCC's orders and regulations cited in the course of these proceedings, including the latest (1996) Order that Western Wireless has dubbed as a "CMRS Flexibility Order" is this, and only this: Historically, federal licenses for radio/wireless telecommunications in spectrum allocated and licensed for CMRS were restricted to mobile applications. With the passage of time and developments in technology, licenses in this spectrum are no longer restricted to mobile applications, as a matter of federal law. But the removal of the former federal restrictions on the use of the spectrum does not displace state regulation when spectrum is used for service to fixed locations.

Where a licensee pursues a business purpose of mobile telephony, it may do so free of state market entry or rate regulation, under 47 U.S.C. 332. Where a licensee pursues a business purpose of radio/wireless telephony to serve locations ("stations") that are fixed and not mobile as defined in the Act, it may do so subject to applicable state laws. That is clear from

Section 332 itself, which includes references to Sections 152(b) and 221(b) of the Act, preserving state authority in the dual system of federal and state regulation of telecommunications.

Fourth, the plain meaning of the word "mobile" as used in the Act does not denote congressional preemption of states' power to regulate market entry by providers of wireless service to fixed locations. Nor has the FCC attempted to preempt states' regulation of wireless telecommunications to fixed locations. In these circumstances, and to borrow a phrase from Justice Scalia's opinion in the Supreme Court's January 1999 decision upholding certain powers of the FCC under the Act, it is "surpassing strange" that Western Wireless should engage in the Orwellian exercise to claim that wireless service to fixed residential locations is the same as wireless service to mobile stations.

If there were any uncertainty about the strange question whether telephone service to a fixed residence is mobile service, all the evidence presented by Western Wireless in this and in the other case shows the answer. Wireless telephone service to a fixed residence is not mobile service.

Fifth, in our nation's federal/state dual system of regulation, each state has the legal power to regulate fixed service market entry by telecommunications companies. In North Dakota, this power has been delegated to the PSC. Sections 49-02-01; 49-03.1, NDCC, et. seq. The PSC is responsible to exercise this authority - not to deny it - and is responsible to sanction violations. Section 49-03.1-08, NDCC. The Federal Congress has not acted to take away this state jurisdiction. 47 U.S.C. 253 and 332. Though it floated a trial balloon in proposed rule-making in 1996, the FCC has not attempted to pre-empt state jurisdiction. The matter is on the back burner (TR, p. 115) and apparently cold, not simmering. Lacking definitive action by the FCC (or by Congress), Western Wireless' arguments that there is no state jurisdiction over fixed wireless telecommunications service are just plain wrong. And so it is evident that Western Wireless' assertions in the PSC proceedings are wholly unsupported as a matter of law.

The North Dakota PSC should exercise its existing authority, rather than assume that preemptive authority will be claimed by the Federal agency.

SUMMARY and CONCLUSION

Even though the telecommunications regulatory climate has changed in the direction of deregulation, telecommunications remains a regulated industry under both federal and state laws. Radio spectrum is licensed only by the FCC. The use of radio spectrum for wireless mobile telephone service is not subject to state rate and entry regulation. Federal regulations do not restrict the use of radio spectrum for wireless telephony to mobile service; radiotelephony to fixed locations is permitted under federal regulations.

The use of radio spectrum for fixed telephone service is, however, also subject to state regulation. Specifically, under section 332 of the Act, mobile wireless service is federally licensed and states have no jurisdiction as to market entry or rates. The plain meaning of the word "mobile," the preservation of state authority (47 U.S.C. 152(b), 221(b) and 253(b), and the provisions of North Dakota's telecommunications statutes (NDCC 49-03.1 affecting certification of public convenience and necessity) combine to compel this conclusion: North Dakota's statutory PCN processes apply equally to wireless and wireline providers of facilities based telecommunications service to fixed stations.

The "M" in CMRS means mobile. The preemption of CMRS under 47 U.S.C. 332 does not exempt Western Wireless' fixed wireless service from state regulation, including the requirement that service not be offered without a certificate of public convenience and necessity, under NDCC 49-03.1. Just as its Eclipse subsidiary is required to and has obtained a certificate, so also Western Wireless itself is required to obtain a certificate of public convenience and necessity before utilizing its wireless infrastructure to provide telecommunications service to fixed locations.

State jurisdiction unquestionably exists under NDCC §49-03.1 unless federal authorities have taken preemptory action. The PSC should not surrender or abandon the state's jurisdiction in the absence of federal preemptive action.

State regulation of wireless telephone service is preempted only if the service is mobile service, and only if the service is provided to instruments that ordinarily do move. The evidence presented on remand, the contracts prepared by Western Wireless, clearly show that the device was to remain stationary and was not

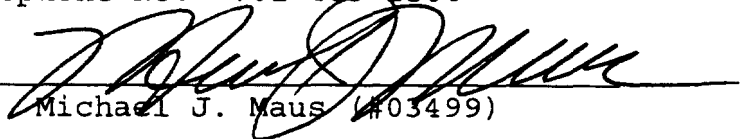
intended to be moved. WRS is not mobile service as offered in Regent, North Dakota, and is not exempt from State regulation.

Dated this 23rd day of October, 2000.

Respectfully submitted,

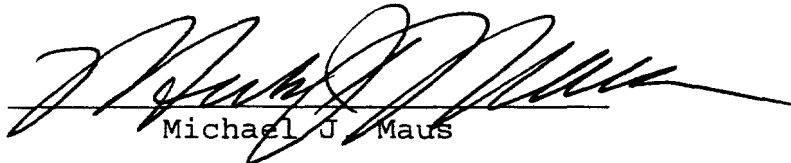
HARDY, MAUS & NORDSVEN, P.C.
Attorneys for Consolidated Telcom
137 First Avenue West, P.O. Box 570
Dickinson, ND 58602-0570
Telephone No: 701-483-4500

By:


Michael J. Maus (#03499)

CERTIFICATE OF MAILING

A true and correct copy of the foregoing **BRIEF OF CONSOLIDATED TELCOM ON REMAND FROM STATE DISTRICT COURT** was on the 23rd day of October, 2000, mailed to Gene DeJordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue, S.E., Suite 400, Bellevue, WA 98006; and Thomas D. Kelsch, Attorney at Law, P.O. Box 1266, Mandan, ND 58554-1266.


Michael J. Maus

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Western Wireless Corporation vs.
Consolidated Telephone Cooperative, Inc.
Complaint**

Case No. PU-1564-99-17

**[PROPOSED]
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

November __, 2000

Appearances

Commissioners Bruce Hagen, Susan E. Wefald and Leo M. Reinbold.

Gene DeJordy, Executive Director-Regulatory Affairs, Western Wireless Corporation, 3650 111th Avenue SE, #400, Bellevue, Washington 98006, on behalf of Western Wireless Corporation.

Thomas D. Kelsch of Kelsch Kelsch Ruff & Kranda PLLP, Attorneys at Law, P.O. Box 1266, Mandan, North Dakota 58554-7266, on behalf of Western Wireless Corporation.

Mark J. Ayotte of Briggs and Morgan, Attorney at Law, 2200 First National Bank Building, 332 Minnesota Street, St. Paul, Minnesota 55101, on behalf of Western Wireless Corporation.

Michael J. Maus of Hardy, Maus & Nordsven, P.C., Attorneys at Law, 137 First Avenue West, P.O. Box 570, Dickinson, North Dakota 58602-0570, on behalf of Consolidated Telcom.

Michael A. Bosh of Pringle & Herigstad, P.C., Attorneys at Law, P.O. Box 1000, Minot, North Dakota 58702-1000, on behalf of Consolidated Telcom.

Illona A. Jeffcoat-Sacco, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

William W. Binek, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505, as Hearing Officer.

Preliminary Statement

On January 15, 1999, Western Wireless Corporation (Western) filed a complaint with the Public Service Commission against Consolidated Telephone Cooperative, Inc. (Consolidated). Western alleged that Consolidated discontinued service to Western with the intent of preventing Western from providing telecommunications service in competition with Consolidated in violation of state and federal law.

On February 9, 1999, Consolidated filed its Answer and Counterclaim. Consolidated denied that its actions were unlawful. In its counterclaim, Consolidated alleged that Western was engaging in competitive local exchange carrier activities without proper authority required under N.D.C.C. Ch. 49-03.1 and N.D.C.C. § 49-21-08.

On August 31, 1999, after conducting a public hearing of the matter, the Commission issued its decision finding, among other things, that Western's telecommunications service constituted a mobile service such that state entry regulation under N.D.C.C. Ch. 49-03.1 and N.D.C.C. § 49-21-08 is preempted under federal law.

On September 14, 1999, Consolidated filed a petition for reconsideration, which was not granted, and on November 1, 1999, the Commission received service of Consolidated's notice of appeal and specifications of error filed in South Central Judicial District Court.

On January 18, 2000, pursuant to N.D.C.C. § 28-32-18, the District Court ordered that the Commission take, hear, and consider additional evidence offered by Consolidated, and remanded the case back to the Commission to amend or reject its initial decision.

On February 18, 2000, upon application of Western, the District Court granted leave to Western to also offer additional evidence during the remand to the Commission.

On July 19, 2000, the Commission issued a Notice of Hearing to consider the additional evidence submitted by the District Court to determine the issue of whether Western's wireless residential telecommunications service is a mobile service under 47 U.S.C. § 332(c)(3)(A).

On September 26, 2000, a formal hearing was held. The parties filed simultaneous briefs on October 24, 2000, according to a briefing schedule set by the Hearing Officer.

On October 30, 2000, the Commission conducted a working session.

Findings of Fact

1. Western is a provider of wireless telecommunications services to customers in North Dakota under license by the Federal Communications Commission.
2. Consolidated is an incumbent local exchange carrier that provides local exchange

telephone service to customers in and around the community of Regent, North Dakota.

3. On January 7, 1999, Western began offering Wireless Residential Service (WRS) in Regent, North Dakota in competition with the local exchange service provided by Consolidated.

4. Western's WRS service requires its customers to use a device that Western terms a "Tellular." This Tellular is the size of a laptop computer, and operates off either AC or battery power. As we previously determined in Finding 34 of our earlier August 31, 1999 decision:

"The Tellular unit is heavy awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use."

5. At the remand hearing on September 26, 2000, Consolidated introduced two documents that Western required each of its WRS customers to sign. The first document, titled a "Wireless Residential Service Agreement," explicitly prohibited the WRS customer from moving the Tellular unit:

"The Unit is intended to remain stationary. Removing the Unit from the location where it was installed by us is a violation of this Agreement and may result in substantial additional fees to you, failure of the Unit, and/or termination of this Agreement."

6. The other document, titled a "Wireless Residential Service Demo/Loaner Equipment Agreement," also specifically prohibited the WRS customer from moving the Tellular unit:

"The Unit is intended to remain stationary: removing the Unit from its Cellular One installation location is a violation of this Agreement and your Cellular One Wireless Residential Service Agreement (your "Service Agreement") and may result in substantial additional fees to you, failure of the Unit, and/or termination of this Agreement."

7. Consolidated argues that these contractual documents establish that the Tellular unit was not designed to be mobile, and that Western never wanted or intended its WRS customers to remove the Tellular units from the customer's residences. We agree. These contracts specifically state that the Tellular units are "intended to remain stationary." The contracts specifically prohibit Western's WRS customers from removing the Tellular units from their installed locations. The contracts specifically state that moving the Tellular unit could result in the failure of the Tellular unit.

8. Western argues that these contracts should be ignored because Western had each of its WRS customers sign amended contracts that removed the language requiring the Tellular unit to remain stationary. However, Western has conceded that it did not amend

the two contract until after Consolidated discovered the contracts and asked the District Court to admit this previously withheld evidence for the Commission's consideration. We do not believe that Western would have made any effort to amend these contracts if the contracts had not been discovered by Consolidated.

9. Western presented evidence at the remand hearing on September 26, 2000 to try to explain why its WRS contracts required the Tellular units to remain stationary. ReAnn Kelsch, a "Manager of External Affairs" for Western, testified at the hearing that she was told that the language prohibiting movement was inserted into the contracts by the "Sales and Marketing Group" to make sure that the WRS customer received a strong service signal. However, it is clear from Ms. Kelsch's testimony that she has no personal or direct knowledge as to why this language was inserted into the contracts. Ms. Kelsch could not explain why movement of the Tellular unit would result in additional fees, why it could cause failure of the Tellular unit, or why movement of the unit should result in termination of the contracts between Western and its WRS customers.

10. We do not find Western's attempted explanations of the contractual prohibition on movement to be convincing. The Tellular unit provided by Western to its each of its WRS customers in the Regent, North Dakota area, although technically capable of being moved, was never designed or intended to ordinarily be moved. It is clear that Western's WRS was never intended to be a mobile service, and that the WRS equipment provided by Western to its WRS customers was not designed to ordinarily be moved. Western clearly intended and designed its WRS to be utilized by its customers from specific and fixed locations.

11. The Commission finds that WRS is not a mobile service, and therefore is not exempt from state entry regulation.

12. Western is a "Public utility" as that term is defined by N.D.C.C. § 49-03.1-02(2).

13. Western has not obtained a certificate of public convenience and necessity to offer WRS in North Dakota.

14. The Commission finds that WRS is a competitive local exchange carrier activity subject to N.D.C.C. Ch. 49-03.1 and N.D.C.C. § 49-21-08.

Conclusions of Law

1. The Commission has jurisdiction of the parties and of this matter.

2. The Tellular unit provided by Western to each of its WRS customers in the Regent area is not a "mobile station" as that term is defined in 47 U.S.C. § 153(28), because the Tellular unit does not ordinarily move.

3. Western's WRS is not a "mobile service" as that term is defined in 47 U.S.C. §

153(27), because the Tellular unit is not a "mobile station" as defined in 47 U.S.C. § 153(28).

4. Western's WRS is not a Commercial Mobile Radio Service exempt from state entry regulation under 47 U.S.C. § 332(c)(3)(A).

5. Western's WRS is a competitive local exchange offering, subject to N.D.C.C. Ch. 49-03.1 and N.D.C.C. § 49-21-08.

6. Western's is currently offering WRS in violation of N.D.C.C. Ch. 49-03.1 and in violation of N.D.C.C. § 49-21-08.

Order

The Commission Orders:

1. Our previous Order of August 31, 1999, dismissing the counterclaim filed by Consolidated against Western on February 9, 1999, is reversed. Consolidated is hereby granted the relief requested in said counterclaim against Western

2. Western shall immediately cease and desist from providing WRS in North Dakota until such time as it has complied with North Dakota law, including N.D.C.C. Ch. 49-03.1 and N.D.C.C. § 49-21-08.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Bruce Hagen
President

Leo M. Reinbold
Commissioner

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3 STATE OF NORTH DAKOTA
4 PUBLIC SERVICE COMMISSION
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6 Case No. PU-1564-99-17
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8 Western Wireless Corporation vs. :
9 Consolidated Telephone Cooperative, Inc. :
10 Complaint :
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13 TRANSCRIPT OF
14 PUBLIC HEARING
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17 Taken At
18 State Capitol
19 600 East Boulevard Avenue
20 Bismarck, North Dakota
21 September 26, 2000
22
23
24 BEFORE WILLIAM W. BINEK
25 -- PROCEDURAL HEARING OFFICER --

1 APPEARANCES (Continued)
2
3 MS. ILLONA A. JEFFCOAT-SACCO
4 Public Service Commission
5 State Capitol
6 600 East Boulevard Avenue
7 Bismarck, North Dakota 58505-0480
8
9 FOR THE COMMISSION STAFF.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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1 APPEARANCES
2 COMMISSIONERS PRESENT:
3 COMMISSIONER BRUCE HAGEN
4 COMMISSIONER LEO M. REINBOLD
5 COMMISSIONER SUSAN E. WEFALD
6
7 MR. GENE DEJORDY of
8 Western Wireless
9 Vice President, Regulatory Affairs
10 Attorney at Law
11 3650 131st Avenue Southeast
12 Bellevue, Washington 98006
13
14 -- and --
15
16 MR. MARK J. AYOTTE of
17 Briggs and Morgan
18 Attorneys at Law
19 2200 First National Bank Building
20 332 Minnesota Street
21 St. Paul, Minnesota 55101
22
23 FOR WESTERN WIRELESS
24 CORPORATION.
25
26
27 MR. MICHAEL J. MAUS of
28 Hardy, Maus & Nordsvan, P.C.
29 Attorneys at Law
30 137 First Avenue West
31 P.O. Box 570
32 Dickinson, North Dakota 58602-0570
33
34 -- and --
35
36 MR. MICHAEL A. BOSH of
37 Pringle & Herigstad, P.C.
38 Attorneys at Law
39 Bremer Bank Building
40 P.O. Box 1000
41 Minot, North Dakota 58702-1000
42
43 FOR CONSOLIDATED
44 TELEPHONE COOPERATIVE,
45 INC.

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Commissioner Hagen is also the telecommunications portfolio holder.

COMMISSIONER HAGEN: Thank you, Bill.

It's good to have you here. We're looking forward to a good hearing. We know this is on remand from the Court and it's important to both parties, so we hope we have a good record to make a decision from. In addition to that, I think you probably brought the good weather today, so we'll enjoy it.

MR. BINEK: Commissioner Susan Wefald.

COMMISSIONER WEFALD: Good morning. I'm also looking forward to this hearing. It's been a while since this -- we met on this issue the last time.

I do have a couple of questions, and I'll just state them now so the Hearing Officer is aware of these questions and so that I can have a chance to get an answer. I'm wondering about the documents that we've already had filed in this case. Document No. 103 was filed by Western Wireless quite a while ago, and then document Nos. 117 and 118, and those are the briefs and the papers that were filed on February 8th of 2000 by Western Wireless.

In going through the materials here and in

(The following proceedings were had and made of record herein, commencing at 10:01 a.m., Tuesday, the 26th day of September, 2000:)

(Exhibits CTC-6 through CTC-10 were marked for identification.)

(Exhibits WW-1 and WW-2 were marked for identification.)

MR. BINEK: Good morning. My name is William Binek, and I am the procedural hearing officer in this proceeding. I will note for the record that the date is September 26th, 2000, and the time is ten o'clock a.m. We're in the Public Service Commission's hearing room on the 12th floor of the State Capitol in Bismarck, North Dakota.

This is the time and place set for hearing on remand from the District Court in the case entitled Western Wireless Corporation versus Consolidated Telephone Cooperative, Inc., complaint, Public Service Commission Case No. PU-1564-99-17 and District Court Civil No. 99-C-2486.

Before I proceed with this case, I will call on each of the Public Service Commissioners for any opening remarks they'd like to offer. First of all, Commission president, Bruce Hagen.

reviewing the case file prior to this hearing, as one Commissioner I'm not certain whether those documents are for me to consider in this particular case or whether those documents were filed with the Court in response to our determination of the last case. So I need some help on that particular issue from whoever can give it to me.

MR. BINEK: I guess, what were the document numbers?

COMMISSIONER WEFALD: The one is document No. 103, and that was filed on the 3rd day of January, the year 2000, and it was filed in South Central Judicial District Court.

MR. BINEK: That's a brief.

COMMISSIONER WEFALD: And that's a brief. An application, motion and brief for leave to offer additional documents, and then I was wondering also about document Nos. 117 and 118, and those are documents filed by Western Wireless, and there, again, it's a brief and a -- it's more than a brief. It's a brief and also another document that was filed on that day, but there are some answering arguments or whatever, and so I need to know whether I am supposed to be considering those as I deal with the particular issues before the

9

1 Commission at this time.

2 MR. BINEK: Well, as far as the --

3 COMMISSIONER WEFALD: The one is a
4 declaration --

5 MR. BINEK: -- additional evidence -- the
6 brief supporting the introduction of additional
7 evidence, the District Court acted on that. The
8 other one I'm not --

9 COMMISSIONER WEFALD: I don't need an
10 answer this minute. I just need to have it
11 answered at some point before the end of the
12 proceedings today so I know what I should be
13 looking at and what I should be considering as I
14 make my decision.

15 MR. BINEK: Well, I think that what you
16 should be looking at, I guess, from my perspective
17 at this point is what is presented at the hearing
18 today. The information that the parties present to
19 you today is what this hearing is about. So --

20 COMMISSIONER HAGEN: They have to make the
21 record today.

22 MR. BINEK: -- if either of these two
23 parties have something additional or some other
24 comments to make, they're free to make them, but
25 that is the way I see this proceeding, is you deal

10

1 with what is presented by them today.

2 COMMISSIONER WEFALD: I just wondered
3 because sometimes in other hearing situations we
4 get preliminary information that's filed, and so
5 that's why I was asking to clarify that. Thank
6 you.

7 MR. BINEK: Commissioner -- excuse me.
8 Did you have anything further, Commissioner Wefald?

9 COMMISSIONER WEFALD: No. I'm looking
10 forward to a good hearing. Thank you.

11 MR. BINEK: Okay. Commissioner Leo
12 Reinbold.

13 COMMISSIONER REINBOLD: Welcome. Looks
14 like everybody in the room has been here before,
15 and I'm looking forward to a good hearing. Thank
16 you.

17 MR. BINEK: Thank you. On January 15,
18 1999, Western Wireless Corporation filed a
19 complaint with the Public Service Commission
20 against Consolidated Telephone Cooperative, Inc.
21 Western alleged that Consolidated discontinued
22 service to Western with the intent of preventing
23 Western from providing telecommunications service
24 in competition with Consolidated in violation of
25 state and federal law.

11

1 On February 9, 1999, Consolidated filed
2 its answer and counterclaim admitting that it
3 discontinued service to Western on January 11th and
4 stating that the service was reconnected on
5 February 1, 1999. Consolidated alleged that
6 Western engaged in competitive local exchange
7 carrier activity without proper authority required
8 under North Dakota Century Code, Chapter 49-03.1
9 and 49-21.08.

10 On August 31, 1999, after conducting a
11 public hearing of the matter, the Commission issued
12 its decision finding, among other things, that
13 Western's telecommunications service constituted a
14 mobile service such that state entry regulation
15 under North Dakota Century Code Chapter 49-03 and
16 Section 49-21.088 is preempted under federal law.

17 On September 14, 1999, Consolidated filed
18 a petition for reconsideration, which was not
19 granted, and on November 1, 1999, the Commission
20 received service of Consolidated's notice of appeal
21 and specification of error filed in South Central
22 Judicial District Court.

23 During the appeal the Court admitted
24 additional evidence offered by Consolidated, and on
25 January 18, 2000, the matter was submitted back to

12

1 the Commission to amend or reject its initial
2 decision. The Court then received an application
3 and motion and brief for leave to offer additional
4 documents by the appellee, Western Wireless
5 Corporation, which was granted by the Court on
6 February 18, 2000.

7 On March 7, 2000, I received a letter from
8 Consolidated's attorney, Michael Maus, requesting
9 to be advised on how the Commission intended to
10 proceed with the case. I responded to Mr. Maus on
11 March 8th advising that there appears to be some
12 uncertainty between the parties as to the
13 appropriate next step and suggested the parties
14 discuss the matter and determine how they would
15 like to proceed.

16 On April 26th, 2000, Mr. Maus sent a
17 letter to the District Court requesting either a
18 telephone conference or further order from the
19 Court clarifying the matter concerning the question
20 of whether the case has been fully remanded to the
21 PSC.

22 On May 5th, 2000, Thomas D. Kelsch,
23 attorney for Western Wireless, sent a letter to the
24 District Court also requesting a telephone
25 conference for further order clarifying the matter.

13

1 On May 10, 2000, the District Court sent a
2 letter to counsel that she cannot take action based
3 on telephone calls or letters and stated that if
4 there's a need for clarification, a motion should
5 be made.

6 On May 17, 2000, Mr. Maus sent another
7 letter to me and to Illona Jeffcoat-Sacco, director
8 of the Commission's public utility division,
9 stating that he did not intend to file a motion
10 with the District Court and believed the case was
11 remanded back to the PSC.

12 On May 19, 2000, I received a letter from
13 Mr. Kelsch advising that it was his intention to
14 file a motion with the District Court sometime
15 within the next week requesting her to clarify her
16 orders.

17 On June 21, 2000, Mr. Maus sent a letter
18 to me requesting that the Commission comply with
19 the order of Judge Hagerty. Illona Jeffcoat-Sacco
20 responded to Mr. Maus advising that I was on annual
21 leave but that the Commission would discuss the
22 matter at its next regular meeting. The Commission
23 directed staff to prepare a notice of hearing for
24 the next Commission meeting.

25 On January 19, 2000, the Commission issued

14

1 its notice of hearing scheduling a public hearing
2 on the remand to be held on July 31, 2000. The
3 hearing was subsequently rescheduled to September
4 6th, 2000, at the request of counsel for Western
5 Wireless. The hearing was again subsequently
6 rescheduled to today at the request of counsel for
7 Western Wireless.

8 The purpose of the hearing will be to
9 consider the additional evidence admitted by the
10 District Court to determine the issue of whether
11 Western Wireless's residential telecommunications
12 service is a mobile service under 47 USC, Section
13 332(C)(3)(A).

14 That concludes my opening remarks. Before
15 we proceed, I'd like to remind everyone that this
16 is a no-smoking area and that we are tape recording
17 this proceeding. Please remember to speak clearly.
18 We will now proceed with an appearance of parties,
19 beginning with Consolidated.

20 MR. MAUS: Mike Maus from Dickinson
21 appearing on behalf of Consolidated.

22 MR. BOSH: Mike Bosh, Pringle & Herigstad,
23 appearing on behalf of Consolidated.

24 MR. BINEK: Western.

25 MR. DEJORDY: Gene DeJordy on behalf of

15

1 Western Wireless Corporation.

2 MR. AYOTTE: Also Mark Ayotte,
3 A-y-o-t-t-e, with the Briggs and Morgan Law Firm in
4 St. Paul, on behalf of Western Wireless.

5 MR. BINEK: Thank you. Are there any
6 preliminary matters that need to be discussed?

7 MR. MAUS: I don't believe so.

8 MR. BINEK: Does Western have any?

9 MR. DEJORDY: No.

10 MR. BINEK: Okay. Thank you. The
11 district judge, as I noted earlier, admitted
12 additional evidence from both parties. Initial
13 evidence was offered by Consolidated and responded
14 to by Western Wireless. I will ask Consolidated to
15 make its presentation for the Commission first
16 concerning the additional evidence it offered, and
17 after allowing for cross-examination and questions
18 by the Commission, I'll call on Western Wireless to
19 make their presentation to the Commission.

20 At this time, Mr. Maus, are you ready to
21 proceed?

22 MR. MAUS: We are.

23 MR. BINEK: You may.

24 MR. MAUS: We'd call Dan Wilhelmson to the
25 stand.

16

1 MR. BINEK: Mr. Wilhelmson, it is a Class
2 C felony punishable by up to a \$5,000 fine and 5
3 years imprisonment to knowingly make false
4 statements or to affirm the truth of a false
5 statement while made while under oath.

6 (Witness sworn.)

7 MR. BINEK: And would you state your full
8 name for the record, please?

9 THE WITNESS: My name is L. Dan
10 Wilhelmson.

11 MR. BINEK: Okay. You may proceed.

12 L. DAN WILHELMSON,
13 having been first duly sworn, was examined and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. MAUS:

17 Q. Please state your -- you've already stated
18 your name. State your occupation and your duties.

19 A. I'm employed at Consolidated Telcom as its
20 CEO and general manager. My responsibilities
21 include management and decisionmaking for the total
22 operations of Consolidated Telcom and its
23 subsidiary companies. I've been employed at
24 Consolidated since 1986, and prior to that I was
25 employed at Northwestern Bell/U S West for 27

17

1 years.

2 Q. What is Consolidated Telcom and where is
3 it located?

4 A. Consolidated Telcom is a cooperative owned
5 by its members, and it is a local exchange carrier
6 as defined by the North Dakota Public Service
7 Commission and the Federal Communications
8 Commission. Consolidated is headquartered in
9 Dickinson, North Dakota, and it serves
10 approximately 8490 subscribers over 8,935 square
11 miles in Adams, Billings, Bowman, Dunn, Hettinger,
12 McKenzie, Slope and Stark Counties in southwestern
13 North Dakota.

14 Q. Is the Regent exchange in your territory?

15 A. Yes.

16 Q. How big is the Regent exchange and how
17 many access lines do you have in Regent?

18 A. A map of the Regent exchange was
19 previously introduced, and we serve on average
20 about 311 subscribers in the exchange, and it
21 covers approximately 580 square miles, all in
22 Hettinger County, North Dakota.

23 Q. Other than the proceedings before the PSC,
24 are there other legal proceedings involving Western
25 Wireless and Consolidated?

18

1 A. Yes. Western Wireless has sued
2 Consolidated in Federal Court for antitrust
3 violations. The matter is pending before the
4 Federal District Court here in Bismarck, and they
5 have also filed a complaint before the Federal
6 Communications Commission.

7 Q. In the course of the antitrust action, did
8 Consolidated discover any documents related to this
9 matter before the PSC?

10 A. Yes. In discovery Western Wireless
11 produced a document called Cellular One Wireless
12 Residential Service Agreement and a document
13 entitled Wireless Residential Service Demo/Loaner
14 Equipment Agreement.

15 Q. What is the significance of the Wireless
16 Residential Service Agreement that we have marked
17 as Consolidated Exhibit 7?

18 A. On the reverse side, paragraph two, the
19 last sentence states that the WRS unit is to remain
20 stationary and that removing the unit from the
21 location is a violation of the agreement.

22 Q. What is the significance of the Wireless
23 Residential Service Demo/Loaner Equipment Agreement
24 that we have marked as Consolidated Exhibit 8?

25 A. The agreement also states that the

19

1 wireless residential unit is to remain stationary
2 and that removing the unit is a violation of the
3 agreement.

4 Q. Is it your understanding that these
5 agreements were being used in Regent when this
6 matter was before the PSC on August 31st, 1999,
7 when the Commission issued its findings in this
8 matter?

9 A. Yes.

10 Q. To your knowledge, did Western Wireless
11 ever disclose the existence of any of these
12 agreements to the PSC?

13 A. No.

14 Q. We have also introduced and marked as
15 Consolidated Exhibit No. 9 what is called Cellular
16 Product Development Wireless Residential Service.
17 Tell us what this is.

18 A. This is another document we received from
19 Western Wireless in discovery. It is an internal
20 Western Wireless document and describes the
21 Western -- the WRS service in Regent as fixed
22 wireless product offering.

23 MR. DEJORDY: I would object to the
24 introduction of that document, although counsel
25 hasn't moved to introduce it, but the document was

20

1 obtained in the context of the antitrust
2 litigation, and in the Court's remand of this
3 proceeding to the Commission it was very specific
4 in its remand order and that was that for this
5 Commission to consider the new evidence submitted
6 by Consolidated in that proceeding along with the
7 evidence submitted by Western Wireless. That
8 evidence was the service agreement and the
9 equipment agreement along with the addendums to
10 those agreements. It did not include additional
11 evidence that Consolidated is now trying to
12 introduce here.

13 MR. BINEK: Do you wish to respond?

14 MR. MAUS: For the record, Exhibit 9 was
15 discovered by Consolidated after January 18th of
16 2000, and it's been our position since the District
17 Court issued its order that the jurisdiction has
18 been back with the PSC. So I think it's in your
19 decision as to whether to accept that document into
20 evidence and make the record total in this case or
21 not accept it.

22 MR. BINEK: My recollection is that the --
23 the District Court remand related to the evidence
24 that was submitted by Consolidated and later by
25 Western. I'm not sure what this additional

21

1 evidence relates to. It seems to me that the
2 proceeding that we're dealing with is limited to
3 what the District Court directed the Commission to
4 do, what it accepted and admitted and then directed
5 the Commission to consider. The document has not
6 been offered, but --

7 MR. MAUS: We'll offer all of the exhibits
8 at the end.

9 MR. DEJORDY: I would just state that, you
10 know, to the extent that this document is not going
11 to be admitted into evidence, there should not be
12 any testimony related to the document, as well, and
13 that shouldn't be introduced into evidence.

14 MR. BINEK: I would agree you can raise
15 your objection at the time.

16 COMMISSIONER REINBOLD: Mr. Examiner, has
17 the document been admitted?

18 MR. BINEK: Hasn't been offered yet.

19 Q. (MR. MAUS CONTINUING) Mr. Wilhelmson,
20 were you aware of the existence of any of these
21 agreements or the product development sheet prior
22 to August 31st, 1999?

23 A. No, I was not.

24 Q. Why is the fact that this is a fixed
25 wireless service important to these proceedings?

22

1 A. Because the federal law defines mobile
2 station as a radio communications station capable
3 of being moved and which ordinarily does move.
4 Mobile service which is exempt from state entry
5 regulation is radio communications between mobile
6 stations and receivers and land stations and mobile
7 communications among themselves. If this is a
8 fixed wireless service which ordinarily does not
9 move as it must be under contracts which expressly
10 prohibit movement, it is not mobile service and is
11 not exempt from state regulation.

12 Q. Are you aware of the recent FCC ruling
13 related to this issue?

14 A. Yes. On July 20th the FCC filed number --
15 filing number 00-283, the FCC rejected the proposed
16 rebuttal presumption that fixed wireless service is
17 mobile. Consolidated Exhibit -- is it 10 -- is a
18 copy of that ruling.

19 MR. MAUS: At this time we would offer
20 Exhibits 6, which is the direct testimony of Mr.
21 Wilhelmson, and the other exhibits referred to in
22 his testimony, through Exhibit 10.

23 MR. DEJORDY: I would object to the
24 introduction of Exhibit No. 9. Again, the
25 proceeding here relates to the issues remanded by

23

1 the Court to this Commission. The Court was
2 specific in its remand order, and that was to
3 consider the new evidence submitted by Consolidated
4 and Western Wireless before the Court. That new
5 evidence consisted of the service agreement and the
6 equipment agreement, along with the addendums to
7 those agreements.

8 MR. BINEK: Do you have any further
9 comments, Mr. Maus?

10 MR. MAUS: You've already heard our
11 comments. Our belief is that after that date of
12 January 18th, 2000, the matter was back before the
13 PSC, and it's within your authority as to whether
14 to accept the additional document or not.

15 MR. BINEK: As I stated earlier, it seems
16 to me that we are limited -- the Commission should
17 limit itself to the evidence that was presented to
18 the District Court and it was the issue of the
19 remand, and therefore the -- I will admit exhibits
20 6, 7, 8 and 10 and deny Exhibit 9.

21 MR. MAUS: We have no further questions of
22 Mr. Wilhelmson.

23 MR. DEJORDY: I just had a further comment
24 concerning the Commission's ruling here. To the
25 extent that Exhibit 9 is not introduced into

24

1 evidence, the questions -- the two questions that
2 follow that question and answer related to Exhibit
3 9 likewise should be stricken from the record
4 because it addresses the issue of whether the
5 service is fixed or mobile. Again, that was an
6 issue that was considered by the Commission in its
7 previous decision and is not an issue here before
8 the Commission in this remand proceeding.

9 MR. BINEK: Do you wish to respond, Mr.
10 Maus?

11 MR. MAUS: Well, we disagree that it's not
12 an issue before the Commission. However, I think
13 it would be consistent if you don't allow the
14 exhibit not to allow the testimony.

15 MR. BINEK: I would agree. That testimony
16 is stricken. Do you tender the witness for
17 cross-examination?

18 MR. MAUS: Yes.

19 MR. BINEK: You may proceed, Mr. DeJordy.

20 MR. DEJORDY: Mr. Wilhelmson, just a
21 couple of questions.

22 COMMISSIONER WEFALD: Excuse me. Would we
23 be able to have those exhibits?

24 MR. MAUS: I've got copies. Should I pass
25 them out?

25

1 MR. BINEK: Yes. Please pass out copies.
2 I'm sorry, I thought they --
3 COMMISSIONER WEFALD: We have nothing.
4 MR. BINEK: All except Exhibit 9. You may
5 proceed.
6 MR. DEJORDY: Mr. Wilhelmson, just a
7 couple of questions.
8 **CROSS-EXAMINATION**
9 **BY MR. DEJORDY:**
10 Q. In your testimony you state that
11 Consolidated obtained documents in the context of
12 the Federal Court antitrust matter, and those
13 documents were the Cellular One Wireless
14 Residential Service Agreement and the Wireless
15 Residential Service Demo/Loaner Equipment
16 Agreement; is that correct?
17 A. Yes.
18 Q. You also state that the matter before the
19 Federal Court is currently pending in Federal
20 District Court here in Bismarck; is that correct?
21 A. Yes.
22 Q. Has the Court issued a decision in that
23 matter?
24 A. Not to my knowledge.
25 Q. Are you aware of the Commission's decision

26

1 on summary judgment issued in that case?
2 A. I'm not sure.
3 Q. Are you aware that the Court found that
4 Consolidated violated antitrust laws in issuing its
5 summary judgment decision in that case?
6 A. Yes, yes.
7 Q. Your testimony is that the contract
8 language in the Cellular One Service Agreement and
9 the Demo/Loaner Equipment Agreement restricts the
10 mobility of the service; is that correct?
11 A. Yes.
12 Q. Would you then agree that the removal of
13 this language results in a customer being able to
14 freely use the service in a mobile manner?
15 A. Presumably.
16 Q. And are you aware of the addendums entered
17 into between Western Wireless and the customers in
18 Regent?
19 A. No.
20 MR. BINEK: Could you move the microphone
21 closer to you, Mr. Wilhelmson? Thank you.
22 MR. DEJORDY: I have no further questions.
23 MR. BINEK: Thank you.
24 MR. MAUS: I have no other questions.
25 MR. BINEK: Okay. The witness is excused.

27

1 Oh, I'm sorry. I'm getting a little bit ahead of
2 myself here. Questions from Commissioners.
3 Commissioner Hagen.
4 COMMISSIONER HAGEN: Don't you go to the
5 Commission?
6 COMMISSIONER WEFALD: You first go to the
7 Commission staff.
8 MR. BINEK: Well, if the Commission staff
9 is participating.
10 MS. JEFFCOAT-SACCO: And I don't have any
11 questions.
12 MR. BINEK: Okay. Commissioner Hagen.
13 COMMISSIONER HAGEN: Okay. Thank you.
14 **EXAMINATION**
15 **BY COMMISSIONER HAGEN:**
16 Q. Mr. Wilhelmson, Dan, why don't you take us
17 through -- in the initial testimony you went
18 through these exhibits kind of fast. Why don't you
19 please take us especially through Exhibit No. 10,
20 if that's in order for you. Just tell us in your
21 own words what this means.
22 A. And I have -- I'm not going to try and
23 interpret it.
24 Q. No. But just your own words.
25 A. But what I understand is that the FCC

28

1 under filing number 00-283 has rejected the
2 proposed rebuttal presumption that fixed wireless
3 service is mobile. So, in other words, my
4 understanding of that is that the FCC has said
5 fixed wireless is no longer mobile.
6 Q. But if I remember from the original
7 hearing -- and there was one of the devices that's
8 used -- you could move it. You could carry it
9 around. It's cumbersome, but you could move it; is
10 that right?
11 A. It's not mobile.
12 Q. It's not like what you think of as a
13 normal mobile phone?
14 A. That's right.
15 Q. Thank you. What is the significance then
16 of the other exhibits we're looking at, and we're
17 just looking at them now.
18 A. Our understanding, Commissioner, is that
19 these agreements were in place at the time of the
20 hearing and were presented to us in other
21 discovery, but they clearly state on the front page
22 of the Wireless Residential Service Demo/Loaner
23 Agreement, at the top in the second line, "the unit
24 is intended to remain stationary," which means that
25 it's not a mobile unit, and on the backside of the

29

1 Wireless Residential Service Agreement, which is
2 this, in the second paragraph -- and it's marked up
3 to the point that I am not sure I can read it
4 fully, but -- The unit is intended to remain
5 stationary. Removing this unit from the location
6 where it is installed is a violation of the
7 agreement and a result -- and may result to
8 substantial additional fees to you as a customer
9 for removing the unit. So the point that I believe
10 Western Wireless made in the initial hearing was
11 that this unit was a mobile unit, and they didn't
12 have any intentions based on these agreements for
13 them to be mobile.

14 Q. So if I understand correctly, what you're
15 saying is that the Court remanded this back to us
16 because we didn't see this evidence in the original
17 hearing, but we're supposed to look at it now?

18 A. That would be my understanding. Yes.

19 COMMISSIONER HAGEN: Thank you. That's
20 all I have.

21 MR. BINEK: Commissioner Wefald.

EXAMINATION

22 BY COMMISSIONER WEFALD:

23 Q. The -- my memory of what we had done in
24 the first order was identify this service as quasi
25

30

1 fixed, kind of a mixture between fixed and mobile,
2 that it was a -- we called it quasi?

3 MR. BINEK: Commissioner Wefald, could you
4 move the microphone closer to you?

5 COMMISSIONER WEFALD: Sure.

6 Q. (COMMISSIONER WEFALD CONTINUING) Does
7 this order address quasi fixed or fixed?

8 A. I believe it addresses the issue that
9 we've been --

10 Q. Talking about.

11 A. That's right.

12 COMMISSIONER WEFALD: I have no further
13 questions.

14 MR. BINEK: Commissioner Reinbold.

15 COMMISSIONER REINBOLD: And I have no
16 questions of this witness at this time. Thank you.

17 MR. BINEK: Mr. Maus, do you have any
18 further questions?

REDIRECT EXAMINATION

19 BY MR. MAUS:

20 Q. Mr. Wilhelmson, looking at Exhibit 8, the
21 Wireless Residential Service Demo/Loaner Equipment
22 Agreement, starting with line three, does it give
23 an indication in there of what happens if the unit
24 is in fact moved?
25

31

1 A. Yes, it does. It just basically says that
2 one installation location -- removing the unit from
3 a Cellular One installation location is a violation
4 of this agreement and your Cellular One Residential
5 Service Agreement, may result in substantial
6 additional fees to you, failure of the unit and/or
7 termination of this agreement.

8 Q. So that even if they take out the language
9 that says that it has to remain stationary,
10 wouldn't it still say that moving the unit may
11 result in failure of the unit?

12 A. Yes. That would be my understanding.

13 MR. MAUS: No other questions.

14 MR. BINEK: Thank you. Mr. DeJordy, I'll
15 allow you to ask questions based on the questions
16 that were presented by the Commissioners, if you
17 have any.

18 MR. DEJORDY: I have no further questions.

19 MR. BINEK: Okay. Thank you. The witness
20 is excused. Mr. Maus, do you have any other
21 witnesses?

22 MR. MAUS: Mr. Hearing Examiner, we have
23 no other witnesses.

24 MR. BINEK: Thank you. Does Western
25 Wireless have any witnesses to present?

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1 MR. DEJORDY: Yes, I do. I know counsel
2 hasn't -- did not ask for an opening statement, but
3 if you would allow me to make an opening statement,
4 I'd like to do so.

5 MR. BINEK: Actually, since there was not
6 an opening statement by Mr. Maus, I guess I'll
7 allow you to make a closing statement. I'll allow
8 both parties to make closing statements, if they
9 choose to do so.

10 MR. DEJORDY: Okay. I would like to call
11 Western Wireless's first and only witness, RaeAnn
12 Kelsch.

13 MR. BINEK: I'm required to advise you
14 that it is a Class C felony punishable by up to a
15 \$5,000 fine and five years imprisonment to
16 knowingly make false statements or to affirm the
17 truth of a false statement made while under oath.

18 (Witness sworn.)

19 MR. BINEK: Would you please state your
20 name for the record?

21 THE WITNESS: RaeAnn Kelsch.

22 MR. BINEK: Thank you. You may proceed,
23 Mr. DeJordy.

24 RAEANN KELSCH,
25 having been first duly sworn, was examined and

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1 testified as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. DEJORDY:**

4 Q. RaeAnn, what company do you work for and
5 what is the business address of that company?

6 A. I work for Western Wireless Corporation,
7 otherwise known as Western Wireless, and I work out
8 of the Bismarck, North Dakota, office, which is
9 located at 541 South Seventh Street, Bismarck,
10 North Dakota, 58504.

11 Q. And is Western Wireless also known as
12 Cellular One here in North Dakota?

13 A. Yes, it is.

14 Q. What is your position within Western
15 Wireless and your responsibilities within the
16 company?

17 A. I am the manager of external affairs,
18 responsible for state legislative and regulatory
19 affairs. In this capacity I work closely with
20 legislators, regulators and local authorities on
21 all matters involving the company's cellular
22 business, including matters related to the
23 company's deployment of wireless local loop
24 service. In North Dakota I was involved in the
25 deployment of the wireless local loop service in

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1 Regent and am involved in ongoing activities with
2 the Regent project, as well.

3 Q. How many customers does Western Wireless
4 have using the wireless local loop equipment in
5 North Dakota?

6 A. Western Wireless has approximately 37
7 customers using the wireless local loop exchanges
8 in Regent, Mott and New England which are served by
9 Consolidated Telephone Cooperative. Western
10 Wireless also serves six wireless local loop
11 customers in other areas in the state utilizing the
12 wireless access unit under a conventional mobile
13 cellular pricing plan.

14 Q. In contrast, how many customers does
15 Western Wireless serve using other types of
16 cellular equipment in North Dakota?

17 A. We have approximately 100,000 cellular
18 customers in North Dakota.

19 Q. What is the purpose of your testimony here
20 today?

21 A. The purpose of my testimony is to address
22 the issue raised in the remand of the state court
23 proceeding before the South Central Judicial
24 District in Case No. 08-99-C-02486/001, which is
25 whether the new evidence submitted in the state

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1 court proceeding would change the outcome of
2 Commission's findings of fact, conclusions of law
3 and order dated August 31st, 1999.

4 Q. What did the Commission conclude in its
5 findings of fact, conclusions of law and order in
6 its August 31st, 1999, order?

7 A. Based on the record evidence submitted by
8 the parties at the hearing on March 10th, 1999, the
9 Commission found that Western Wireless's wireless
10 local loop service deployed in Regent has mobile
11 capabilities and is therefore a mobile service
12 exempt from state entry regulation. The Commission
13 also determined that Consolidated had violated
14 various state law requirements in unlawfully
15 discontinuing telephone service to Western Wireless
16 and its customers.

17 Q. RaeAnn, please explain what new evidence
18 was submitted in the state court proceeding.

19 A. The new evidence submitted by Consolidated
20 was a copy of the Cellular One Wireless Residential
21 Service Agreement and Wireless Residential Service
22 Demo/Loaner Equipment Agreement entered into
23 between Western Wireless and its wireless local
24 loop service customers in Regent. The additional
25 evidence submitted by Western Wireless was a copy

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1 of the addendum to Wireless Residential Service
2 Demo/Loaner Equipment Agreement and to the Wireless
3 Residential Service Agreement which was entered
4 into between Western Wireless and our wireless
5 local loop customers in Regent.

6 Q. Are you familiar with the Cellular One
7 Wireless Residential Service Agreement, the
8 Wireless Residential Service Demo/Loaner Equipment
9 Agreement and the addendums entered into with the
10 wireless local loop customers?

11 A. Yes.

12 Q. In the Cellular One Wireless Residential
13 Service Agreement Section 2 contained what seems to
14 be a recommended restriction on the use of wireless
15 local loop equipment. Could you read the last two
16 sentences of section two of that agreement?

17 A. Yes. "The unit is intended to remain
18 stationary. Removing the unit from the location
19 where it was installed by us is a violation of this
20 agreement and may result in substantial additional
21 fees to you, failure of the unit and/or termination
22 of this agreement."

23 Q. Why would the Cellular One Wireless
24 Residential Service Agreement contain this language
25 which seems to restrict the mobility of the